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Refuge in an Insecure Time: Seeking Asylum in the Post-9/11 United States

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Eleanor Acer

Abstract

The current climate of insecurity has in a sense presented an opportunity for those with restrictive immigration agendas to use a new vocabulary to advance long desired objectives as well as new policies that sacrifice fairness and negatively affect immigrants. The result has been a decline in due process and the undermining of basic protections of international refugee and human rights law, including: the prohibition on arbitrary detention, embodied in Article 9 of the International Covenant on Civil and Political Rights; the prohibition on returning a refugee to persecution, the cornerstone of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol; and the right to asylum, contained in the Universal Declaration of Human Rights. The task that Arthur Helton flagged—ensuring that the rights of refugees are not violated in the new “securitized” climate—has become a monumental challenge.

ARTICLES

REFUGEE IN AN INSECURE TIME: SEEKING ASYLUM IN THE POST-9/11 UNITED STATES

*Eleanor Acer**

INTRODUCTION

On September 11, 2001, the world changed in many ways. The tragic events of that day left many Americans with a greater understanding of the sense of vulnerability that is a daily reality for many of the world's refugees. Arthur Helton, who dedicated his legal career to advancing the human rights of refugees, understood the impact that the attacks would have on those who sought asylum in the United States. In June 2002, Helton observed that "[r]efugee and asylum policy is being securitized as a result of the horrific terrorist attacks of September 11."¹ Looking to the future, he stressed that "[t]he task will be to ensure that these new security measures do not violate the rights of refugees."²

None of the September 11th hijackers were asylum-seekers or refugees.³ Yet those who seek refuge in the United States have been profoundly affected by the many new immigration policies and practices that were initiated in the months and years following the attacks. Some asylum-seekers and refugees, like other immigrants, were swept up in the series of immigration enforcement actions that were launched by the U.S. government

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1. Arthur Helton, *World Refugees: Arthur Helton*, USATODAY.COM, June 20, 2002, at <http://www.usatoday.com/community/chat/2002-06-20-helton.htm> (last visited Oct. 10, 2005).

2. *Id.*

3. See James H. Johnson, Jr., *U.S. Immigration Reform, Homeland Security, and Global Economic Competitiveness in the Aftermath of the September 11, 2001 Terrorist Attacks*, 27 N.C.J. INT'L L. & COM. REG. 419, 38 (2002) (discussing the immigration status of the September 11th hijackers).

after September 11th.⁴ At the same time, asylum-seekers have also fallen victim to a broad shift away from individualized decision-making towards more blanket approaches — approaches that have, for instance, called for the detention of asylum-seekers based on their country of nationality rather than on an assessment of the need for detention in their individual cases.⁵

Asylum itself has in some ways been redefined by the U.S. government as a “security” issue. The refugee resettlement program was shut down for several months after September 11th, even though none of the September 11th hijackers had entered the country through that program.⁶ In a move that will permanently alter the asylum discourse in the United States, the responsibility for asylum matters, along with other immigration functions, was transferred from the former Immigration and Naturalization Service (“INS”) to the U.S. Department of Homeland Security (“DHS” or “the Department”).⁷

It should hardly be a surprise then that some have tried to adopt, and in some instances, exploit, the language of “security” and the specter of “terrorism” to justify a wide range of changes in U.S. law and policies. This language has been used by the U.S. Department of Justice (“DOJ”) to justify regulatory measures that expedite asylum and other immigration appeals, as well as policies that prohibit immigration judges from considering the need to detain individual Haitian asylum-seekers.⁸ Ignor-

4. See *infra* notes 12, 23-38; see also Jody A. Benjamin, *Iraqi Refugees Cleared by FBI Could Still Face Deportation*, SUN-SENTINEL (Fort Lauderdale, Fla.), Dec. 12, 2001, at 1B.

5. See *infra* note 96 and accompanying text; see also *infra* notes 105, 108-14 and accompanying text.

6. See David A. Martin, *A New Era for U.S. Refugee Resettlement*, 26 COLUM. HUM. RTS. L. REV. 299, 299-321 (2005); see also LAWYERS COMMITTEE FOR HUMAN RIGHTS (NOW HUMAN RIGHTS FIRST), *A YEAR OF LOSS: REEXAMINING CIVIL LIBERTIES SINCE SEPTEMBER 11* 13 (2002), available at http://www.lchr.org/pubs/descriptions/loss_report.pdf (last visited Apr. 12, 2005) [hereinafter *A YEAR OF LOSS*]; Elizabeth Heger Boyle & Fortunata Ghati Songora, *Formal Legality and East African Immigrant Perceptions of the “War on Terror”*, 22 LAW & INEQ. 301, 320 (2004).

7. See U.S. Dep’t of Homeland Security [DHS], *Immigration and Borders*, at http://www.dhs.gov/dhspublic/theme_home4.jsp (last visited Apr. 12, 2005); see also T. ALEXANDER ALEINIKOFF, CENTURY FOUNDATION, *THE DEPARTMENT OF HOMELAND SECURITY’S FIRST YEAR 1* (2004), available at www.migrationpolicy.org/pubs/aleinikoff_immigration_0304.pdf (last visited June 7, 2005); LAWYERS COMMITTEE FOR HUMAN RIGHTS, *REFUGEES, ASYLUM SEEKERS AND THE NEW DEPARTMENT OF HOMELAND SECURITY; INITIAL CONCERNS AND PRELIMINARY RECOMMENDATIONS 1* (2003), available at http://www.humanrightsfirst.org/refugees/refs_032503.pdf (last visited June 7, 2005) [hereinafter *REFUGEES, ASYLUM SEEKERS AND THE NEW DHS*].

8. See *infra* notes 111, 114, 124 and accompanying text.

ing significant past reforms and extensive security safeguards, unsubstantiated claims that terrorists are trying to abuse the asylum system have been made in connection with efforts to push legislation that would make it much harder for virtually all asylum-seekers to obtain asylum.⁹ One legislative proposal passed by the House of Representatives was so extreme that it would have barred U.S. federal courts from issuing stays of removal to prevent asylum-seekers from being returned to their countries of persecution while U.S. courts review their cases.¹⁰

The current climate of insecurity has in a sense presented an opportunity for those with restrictive immigration agendas to use a new vocabulary to advance long desired objectives as well as new policies that sacrifice fairness and negatively affect immigrants. The result has been a decline in due process and the undermining of basic protections of international refugee and human rights law, including: the prohibition on arbitrary detention, embodied in Article 9 of the International Covenant on Civil and Political Rights; the prohibition on returning a refugee to persecution, the cornerstone of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol; and the right to asylum, contained in the Universal Declaration of Human Rights.¹¹ The task that Arthur Helton flagged — ensuring that the rights of refugees are not violated in the new “securitized” climate — has become a monumental challenge.

I. THE INITIAL RESPONSE

In the immediate aftermath of the September 11th attacks, the U.S. government launched a broad array of initiatives, including a series of immigration enforcement measures.¹² While a

9. See *infra* notes 154-56, 161, 169 and accompanying text.

10. See *infra* notes 147, 152, 167. As detailed later in this Article, this proposed provision did not ultimately become law. See REAL ID Act of 2005, H.R. 418, 109th Cong. (2005).

11. See International Covenant on Civil and Political Rights, art. 9, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 371; Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 189 U.N.T.S. 150 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]; Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., art. 14, U.N. Doc. A/810 (1948).

12. See generally HUMAN RIGHTS FIRST, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES iv (2003), available at <http://www.humanrightsfirst.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf> (last visited May 13, 2005); MIGRATION POLICY INSTITUTE, AMERICA'S CHALLENGE: DOMES-

number of these changes impacted asylum-seekers, several had a particularly significant effect on those who seek refuge in the United States.

A. *The USA Patriot Act*

On October 25, 2001, less than six weeks after the September 11th attacks, the U.S. Congress passed the USA PATRIOT Act.¹³ Signed into law the next day,¹⁴ the PATRIOT Act contains a wide range of provisions that undermine civil rights and civil liberties. For instance, the law greatly expanded the ability of federal officials to carry out searches and seizures without prior notice.¹⁵ The PATRIOT Act also enhanced surveillance procedures, including eavesdropping on conversations between attorneys and clients.¹⁶

Among the many provisions included in the PATRIOT Act are immigration provisions that further expanded the bars to admissibility and deportability relating to terrorism.¹⁷ For asylum-seekers though, the new law triggered an increase in the use of existing bars to asylum.¹⁸ Ironically, in the years since September 11th, the broad language of pre-September 11th law has

TIC SECURITY, CIVIL LIBERTIES AND NATIONAL UNITY AFTER SEPTEMBER 11 (2003), available at http://www.migrationpolicy.org/pubs/Americas_Challenges.pdf (last visited June 7, 2005); see also Tom Mccann, *Lawyers Scramble to Help Immigrants Caught in the Net of Tighter Enforcement*, CHI. LAW., Aug., at 8 (2003) (discussing the impacts of post-September 11th immigration law on asylum-seekers and other nonimmigrants).

13. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act)*, 18 U.S.C § 3103 (2005) [hereinafter PATRIOT Act]. The House of Representatives passed the PATRIOT Act on October 24, 2001, by a vote of 357 to 66, with 9 members not voting. See 147 Cong. Rec. H7224 (daily ed. Oct. 24, 2001) (roll call vote 398). The Senate followed suit the very next day, passing the act on October 25, 2001, by a vote of 98 to 1, with 1 senator not voting. See 147 Cong. Rec. S11059-60 (daily ed. Oct. 25, 2001) (roll call vote 313).

14. President Bush signed the PATRIOT Act on October 26, 2001. See Scott Bernard Nelson, *Patriot Act Would Make Watchdogs of Firms*, BOSTON GLOBE, Nov. 18, 2001, at G1; A YEAR OF LOSS, *supra* note 6 at 8.

15. See PATRIOT Act, 18 U.S.C § 3103 (2005).

16. See *id.*; see also John Whitehead, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis Of The USA PATRIOT Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U.L. REV. 1081, 1083 (2002).

17. See PATRIOT Act, 18 U.S.C §§ 411-12 (2005); see also David Cole, *Terrorizing Immigrants in the Name of Fighting Terrorism*, 29 Hum. Rts. 11 (2002); Regina Germain, *Rushing to Judgment: The Unintended Consequences of the USA PATRIOT Act for Bona Fide Refugees*, 16 GEO. IMMIGR. L.J. 505, 517-25 (2002).

18. See Germain, *supra* note 17.

been used by U.S. immigration authorities to argue that a wide range of people should be barred from asylum — including refugees who are actually victims of terrorism or repressive regimes.¹⁹ This broadly sweeping approach is not consistent with the Refugee Convention's precise approach in assessing whether an individual refugee should be excluded from its protection.²⁰

For example, attorneys working for DHS' Bureau of Immigration and Customs Enforcement ("ICE") have argued that members of a Burmese Christian ethnic minority, who are victims of torture and persecution at the hands of the notorious Burmese military regime, are barred from asylum for having provided support to a political movement whose armed wing has used force to oppose this repressive regime.²¹ At the same time, attorneys with the DOJ are now arguing that a former policeman from Colombia — a victim of extortion by FARC guerillas who controlled the territory where he lived — is barred from asylum because the extorted payments somehow constituted "material support" to FARC, a designated terrorist organization.²²

B. *Expansion of Detention Authority*

In the wake of the September 11th attacks, the U.S. government took a number of steps to broaden its authority to detain non-citizens. The PATRIOT Act gave U.S. immigration authorities unprecedented power to detain non-citizens who are designated as terrorist threats by the Attorney General.²³ The PA-

19. See, e.g., Germain, *supra* note 17, at 509, 512 (discussing how the ample pre-September 11th provisions barring terrorists were used to prevent Colombian asylum seekers, who were the victims of extortion, from entering the country); see also *infra* note 22 and accompanying text.

20. See *infra* note 22 and accompanying text. For a detailed discussion of the Refugee Convention's exclusion guidelines, see Michael Bliss, 'Serious Reasons For Considering': Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses, 12 INT'L J. REFUGEE L. 92 (2000, special supplementary issue).

21. Information about the position of U.S. Immigration and Customs Enforcement in these cases was received by Human Rights First through its pro bono representation and advocacy assistance.

22. See Brief for Human Rights First as *Amicus Curiae* Supporting Petitioner at 5, *Aria v. Gonzales*, 2005 U.S. App. LEXIS 15999 (3d Cir. 2004) (No. 04-1999) available at http://humanrightsfirst.org/asylum/probono/special/pb_special.htm (last visited Apr. 24, 2005) (explaining that petitioner's alleged voluntary payments to armed guerillas were done out of fear of death).

23. For a discussion of the detention provisions of the USA Patriot Act, see Germain, *supra* note 17; see also David Martin, *The Missing Patriot Debate*, NATION, May 30, 2005; Statement of David Martin to the National Commission on Terrorist Attacks

TRIBUT Act's immigration detention powers are however subject to some degree of judicial review and Congressional oversight.²⁴

But even before the PATRIOT Act was passed, the DOJ had begun taking steps to expand its already substantial authority to detain non-citizens. On September 17, 2001, Attorney General John Ashcroft issued a regulation increasing the number of hours that the INS could detain someone without charge from twenty-four to forty-eight hours.²⁵ The regulation also authorized detention without charge for an unspecified additional "reasonable period of time" in the event of an "emergency or other extraordinary circumstance."²⁶ Unlike the PATRIOT Act's detention provision, this authority is not limited to detainees suspected of terrorist activity.²⁷

Another regulation, which took effect on October 29, 2001, gave INS, and now DHS, attorneys — the prosecutors in immigration proceedings — the power, in effect, to suspend an immigration judge's release order.²⁸ Under the regulation, the government attorney's decision to appeal the judge's order triggers an "automatic stay" of the judge's decision to release.²⁹ This rule applies in the case of essentially any type of immigrant; there is no requirement that the individual be suspected of a crime or terrorist activity.³⁰ This new power was used against some of the many Arab and Muslim men detained in the United States in the aftermath of the September 11th attacks, and before long, the

Upon the United States, (Dec. 8, 2003), at http://www.9-11commission.gov/hearings/hearing6/witness_martin.htm (last visited June 7, 2005) [hereinafter David Martin Statement] (recommending repeal of post 9-11 regulation expanding detention authority, citing its vague language and misuse).

24. See Immigration and Nationality Act [INA], § 236A(b)(1), 8 U.S.C. 1226A (2005); see also *A YEAR OF LOSS*, *supra* note 6 at 17 (listing various safeguards, including that the Attorney General must charge or release a detainee within seven days, that his certification is subject to judicial review, and that he must report to Congress every six months specific details about the use of these new powers).

25. See Disposition of Cases of Aliens Arrested Without Warrant, 66 Fed. Reg. 48,334, 48,335 (Sept. 17, 2001) (codified at 8 C.F.R. § 287.3) (providing federal field officers with expanded powers to detain aliens).

26. *Id.*

27. Compare *id.* with INA § 236A(b)(1), 8 U.S.C. 1226A (2005) (regarding detention of those the Attorney General certifies as suspected terrorists).

28. See Review of Custody Determinations, 66 Fed. Reg. 54,909, 54,910 (Oct. 31, 2001) (codified at 8 C.F.R. § 1003.19) (providing for an automatic stay of an immigration judge's decision to order an alien's release).

29. *Id.*

30. See *id.*

INS began using this extraordinary power to prevent Haitian asylum-seekers from being released from detention in Florida.³¹

C. *The Detention of Arab and Muslim Men*

In the wake of the September 11th attacks, over 1200 non-citizens — primarily Arab or Muslim men — were detained by the U.S. government.³² A June 2003 report issued by the DOJ Office of Inspector General (“OIG”) documented a range of disturbing abuses, including lengthy detentions without charges, denial of access to counsel, and abusive treatment.³³ While the vast majority of these individuals were not asylum-seekers, some refugees were caught up in this wave of detentions.

The OIG report makes clear that many of those detained after September 11th on immigration violations did not receive core due process protections, and the decision to detain them was at times “extremely attenuated” from the focus of the Sep-

31. See Bureau of Citizenship and Immigration Services (“USCIS”), *Watching Justice*, available at <http://www.watchingjustice.org/offices/officeCompilation.php?docId=33> (last visited Apr. 24, 2005) (noting immigration policies denying asylum to Haitians and allowing indefinite detention of Haitians without consideration of individual circumstances); see also *A YEAR OF LOSS*, *supra* note 6 at 19; *Almonte-Vargas v. Elwood*, 2002 U.S. Dist. Lexis 12387 (E.D. Pa. June 28, 2002) (lifting the automatic stay of an Immigration Judge’s order to release a petitioner on bond); WOMEN’S COMMISSION FOR REFUGEE WOMEN & CHILDREN, *REFUGEE POLICY ADRIFT: THE UNITED STATES AND DOMINICAN REPUBLIC DENY HAITIANS PROTECTION* 43 (2003), available at <http://www.womenscommission.org/reports/index.shtml> (last visited June 7, 2005).

32. According to the Department of Justice’s Office of Inspector General (“OIG”), over 1200 non-citizens and citizens were detained within two months of the September 11 attacks. The Department of Justice advised OIG that it “stopped reporting the cumulative totals after the number reached approximately 1200, because the statistics became confusing.” OFFICE OF INSPECTOR GENERAL, U.S. DEPARTMENT OF JUSTICE, *THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS* 1 (2003), available at <http://www.usdoj.gov/oig/special/0306/full.pdf> (last visited June 7, 2005) [hereinafter OIG REPORT]; DAVID COLE, *ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM* 25 (2003) (estimating that by May 2003, more than 5,000 people had been forced into preventive detention); see also Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 331 (2002) (noting that within a matter of weeks after the attacks, approximately 1,000 people were detained).

33. See generally OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF JUSTICE, *THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11TH ATTACKS*, June 2003, available at <http://www.usdoj.gov/oig/special/0306/index.htm> (last visited Apr. 24, 2005) [hereinafter TREATMENT OF ALIENS].

tember 11th investigation.³⁴ The OIG found that the “vast majority” of the detainees were accused not of terrorism-related offenses, but of civil violations of federal immigration law.³⁵

With the new regulations expanding immigration detention authority in place, many detainees did not receive notice of the charges against them for weeks, and some for more than a month after being arrested.³⁶ The OIG reported that 192 detainees waited longer than seventy-two hours to be served with charges; twenty-four were held between twenty-five and thirty-one days before being served; twenty-four were held more than thirty-one days before being served; and five were held an average of 168 days before being served.³⁷ Also, the lack of timely notice of the charges against them undermined the detainees’ ability to obtain legal representation, to request bond, and to understand why they were being detained.³⁸

D. *The Drop in Refugee Resettlement*

Immediately after the September 11th attacks, the Bush Administration ordered a suspension in the U.S. Refugee Resettlement Program, the U.S. humanitarian program which brings refugees from around the world to safety in the United States.³⁹ Through the program, faith-based and other resettlement groups work with the U.S. government to welcome refugees into the American community in a unique private-public partnership. The program, held up as a model for other countries, has provided a new life in safety and dignity for hundreds of thousands

34. See *id.* ch. 4, § VII; OIG REPORT, *supra* note 32, at 69; see also ASSESSING THE NEW NORMAL, *supra* note 12, at 34-35.

35. See TREATMENT OF ALIENS, *supra* note 33, ch. 3, Introduction; OIG REPORT, *supra* note 32, at 27; see also ASSESSING THE NEW NORMAL, *supra* note 12, at 34.

36. See TREATMENT OF ALIENS, *supra* note 33, ch. 3 § IV, at 30, 35; ASSESSING THE NEW NORMAL, *supra* note 12, at 34-35; see also David Martin Statement, *supra* note 23.

37. See TREATMENT OF ALIENS, *supra* note 33, ch. 3, § III(A), at 30.

38. See *id.* ch. 3, § IV, at 155; see also ASSESSING THE NEW NORMAL, *supra* note 12, at 35.

39. See Office of Refugee Resettlement, Administration for Children and Families, U.S. Dep’t of Health and Human Services, U.S. Resettlement Program — An Overview (2002), at <http://www.acf.dhhs.gov/programs/orr/programs/overviewrp.htm> (last visited May 14, 2005) [hereinafter U.S. Resettlement Program] (explaining that three federal agencies play key roles in the Refugee Resettlement Program: DHS, The Department of State, and the Department of Health and Human Services); see also ASSESSING THE NEW NORMAL, *supra* note 12, at 44-45; DAVID A. MARTIN, THE UNITED STATES REFUGEE ADMISSIONS PROGRAM: REFORMS FOR A NEW ERA OF REFUGEE RESETTLEMENT (2005).

of refugees over the last two decades.⁴⁰

The resettlement suspension lasted for more than two months while the Administration conducted a security review.⁴¹ Even after resettlement resumed, though, the pace of resettlement was so slow that thousands of refugees each year were left stranded in difficult and dangerous conditions.⁴² This humanitarian effort fell from helping an average of 90,000 refugees resettled annually, to 27,110 in 2002⁴³ and 28,455 in 2003.⁴⁴ Nearly two years after September 11th, the U.S. Refugee Resettlement Program was still hampered by lengthy delays in the conduct of new security checks and, as a bipartisan group of members of Congress noted, "a seeming chronic inability to meet the refugee admissions targets set in recent presidential determinations."⁴⁵

The pace of resettlement improved substantially in 2004, with a total of 52,868 refugees resettled during the fiscal year.⁴⁶ Despite this progress though, the number of refugees resettled

40. See U.S. Resettlement Program, *supra* note 39.

41. See FRED TSAU, ILLINOIS COALITION FOR IMMIGRANT AND REFUGEE RIGHTS, THE LOSS OF FREEDOM, EQUALITY, AND OPPORTUNITY FOR AMERICA'S IMMIGRANTS SINCE SEPTEMBER 11 6 (Sep. 2003), available at <http://www.icirr.org/dat/pages/losing-ground03.pdf> (last visited May 14, 2005); see also Annie Wilson, *Reach Out To Refugees*, BALTIMORE SUN, June 20, 2002, at 15A (reporting that President Bush restarted the Refugee Resettlement program on November 21, 2001). In fiscal year 2002, the maximum number of refugees who could be resettled to the United States was dropped to 70,000. See DHS, 2002 YEARBOOK OF IMMIGRATION STATISTICS 6 (Oct. 2003), available at <http://uscis.gov/graphics/shared/statistics/yearbook> (last visited Apr. 25, 2005) [hereinafter 2002 DHS YEARBOOK OF IMMIGRATION STATISTICS]. Even this lowered limit was not reached: "Refugee arrivals into the United States decreased from almost 69,000 in fiscal year 2001 to 27,000 in fiscal year 2002." *Id.* at 52.

42. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, IMBALANCE OF POWERS: HOW CHANGES TO U.S. LAW & POLICY SINCE 9/11 ERODE HUMAN RIGHTS AND CIVIL LIBERTIES 27-28 (2003), available at http://www.humanrightsfirst.org/us_law/loss/imbalance/powers.pdf (last visited May 13, 2005) [hereinafter IMBALANCE OF POWERS].

43. See Erin Patrick, *The U.S. Refugee Resettlement Program*, MIGRATION POL'Y INST. INSIGHT, June 2004, available at <http://www.migrationinformation.org/USFocus/display.cfm?id=229#3> (last visited May 13, 2005).

44. See *id.*

45. Letter from U.S. Representatives Chris H. Smith (R-NJ) and Howard Berman (D-CA), and U.S. Senators Sam Brownback (R-KS) and Edward Kennedy (D-MA) to President George W. Bush (July 31, 2003), available at http://www.refugeecouncilusa.org/ltr_to_gwb-7-31-03.pdf (last visited May 13, 2005).

46. See U.S. DEP'T OF STATE, BUREAU OF POPULATION, REFUGEES AND MIGRATION, SUMMARY OF REFUGEE ADMISSIONS FISCAL YEAR 2004, available at <http://www.state.gov/documents/organization/37128.pdf> (last visited May 13, 2005) [hereinafter REFUGEE ADMISSIONS 2004].

in the United States in 2004 was still significantly below the 70,000 target that had been set by the President for the year and well below the pre-September 11th level of 90,000 refugees.⁴⁷ In March 2005, the Refugee Council USA warned that the number of refugees brought to safety by the United States through this program might actually fall again in 2005 due to U.S. funding shortfalls.⁴⁸

E. *The Smart Border Pact and the Safe Third Country Agreement*

On December 12, 2001, the United States and Canada entered into a Smart Border Declaration,⁴⁹ which was described as an effort to increase security and streamline border crossings.⁵⁰ Among the thirty action items in this Smart Border Declaration was an item that Canada had long wanted — a Safe Third Country Agreement.⁵¹ Such an agreement, modeled partly on similar arrangements between European States,⁵² would significantly decrease the number of people seeking asylum in Canada by forc-

47. See Hebrew Immigrant Aid Society, Washington Update, Dec. 20, 2004, available at www.hias.org/News/Archives/Dec04.html (last visited May 14, 2005); see also REFUGEE ADMISSIONS 2004, *supra* note 46.

48. See REFUGEE COUNCIL USA, FEWER REFUGEES BEING RESCUED, available at <http://www.refugeecouncilusa.org/pr-3-21-05-w.pdf> (last visited May 14, 2005).

49. See Canadian Embassy, Washington D.C., *Building a Smart Border for the 21st Century*, available at <http://www.canadianembassy.org/border/index-en.asp> (last modified Mar. 24, 2005).

50. Former Director of Homeland Security, Tom Ridge, said the goal of the Smart Border Agreement was “to make North America more secure and more prosperous.” He also declared that the plan would facilitate border crossing for the “average U.S. or Canadian resident.” U.S., *Canada Sign “Smart Border” Declaration*, CNN.COM, Dec. 13, 2001, available at <http://archives.cnn.com/2001/US/12/12/rec.canada.border/>.

51. *Family Unity, Other Issues Discussed at House Hearing on the U.S.-Canada Safe Third Country Agreement*, 79(41) INTERPRETER RELEASES 1570 (Oct. 21, 2002) [hereinafter INTERPRETER RELEASES-FAMILY UNITY] (“Kelly Ryan, Deputy Assistant Secretary for the Department of State’s Bureau of Population, Refugees, and Migration, noted that Canada has had a longstanding interest in concluding such an agreement with the [United States]. She said that approximately one-third of the persons who apply for asylum in Canada pass through the U.S. first. Negotiations between the two countries intensified from 1995 to 1997, but were then abandoned, Ms. Ryan explained. Canada raised the issue of drafting a safe third country agreement again after the terrorist attacks of September 11, 2001.”); see also Bill Frelick, *Who’s on First? The Canada-U.S. Memorandum of Agreement on Asylum*, 73 INTERPRETER RELEASES 219 (Feb. 26, 1996).

52. See Canadian Council for Refugees, Comments on Proposed Agreement for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries (July 30, 2002), available at <http://www.web.net/~ccr/comments3c.html> (last visited May 14, 2005). See generally JOANNE VAN SELM, UNHCR, CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE IN CONNECTION WITH UNCHR GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, ACCESS TO PROCEDURES: ‘SAFE THIRD COUNTRIES,’ ‘SAFE

ing some who had transited through the United States on their way to Canada to apply for asylum in the United States instead.⁵³ There are some exceptions to this scheme, but they are limited.⁵⁴

With the broad border plan viewed as a critical security objective, the United States was willing to agree to this controversial agreement.⁵⁵ U.S. officials acknowledged that the Safe Third Country Agreement itself was not needed to protect U.S. security.⁵⁶ Instead, asylum-seekers were essentially treated as bargaining chips in the broader effort to ensure Canadian agreement on other border issues.

The United States and Canada signed the Safe Third Coun-

COUNTRIES OF ORIGIN' AND 'TIME LIMIT' (2001), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home?page=search> (last visited June 7, 2005).

53. See Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, Dec. 5, 2002, U.S.-Can., State Dept. No. 05-35, 2004 WL 3269854, available at <http://www.cic.gc.ca/english/policy/safe-third.html> (last visited May 13, 2005) [hereinafter Safe Third Country Agreement].

54. See *id.* art. 4. The Agreement contains some family-based exceptions. Section 2 of Article 4 states that:

Responsibility for determining the refugee status claim of any person referred to in paragraph 1 shall rest with the Party of the receiving country, and not the Party of the country of last presence, where the other Party determines that the person:

- a. Has in the territory of the other Party at least one family member who has had a refugee status claim granted or has been granted lawful permission to remain indefinitely in that other Party's territory; or
- b. Has in the territory of the other Party at least one family member, other than an aunt, uncle, sibling, niece, or nephew, who is at least 18 years of age and is not ineligible to pursue a refugee status claim in that other Party's refugee status determination system and has such a claim pending; or
- c. Is an unaccompanied minor; or
- d. Arrived in the territory of the other Party:
 - i. With a validly issued visa or other valid admission document, other than for transit issued by the other Party; or
 - ii. Not being required to obtain a visa by only the other Party.

Id. art. 4(2). The Article also contains a "public interest" exception.

55. See INTERPRETER RELEASES, *supra* note 51.

56. See *United States and Canada Safe Third Country Agreement: Hearing Before the Subcommittee on Immigration, Border Security, and Claims, of the Comm. on the Judiciary*, 107th Cong. 34 (2002) (Testimony of Kelly Ryan, Deputy Assistant Secretary, Bureau of Population, Refugees, and Migration, U.S. Dep't of State) ("We view this not as a counterterrorism measure, but as a separate part of the 30-point action plan, and not tied directly to counterterrorism . . . it does not directly affect U.S. security. It is important to the Government of Canada, and it is important for us getting the other objectives of the border plan . . .").

try Agreement on December 5, 2002.⁵⁷ After implementing regulations were finalized, the agreement went into effect at the U.S.-Canada border on December 29, 2004.⁵⁸ Ironically, of the many immigration and security issues at the border, the process for handling asylum claims had actually worked quite well. Groups that worked with refugees in the border areas expressed their concern that the agreement would dismantle this orderly border process and could actually undermine security by leaving refugees vulnerable to exploitation by smugglers.⁵⁹

II. *THE DEPARTMENT OF HOMELAND SECURITY ("DHS")*

On March 1, 2003, the INS was abolished and its functions transferred to the new DHS.⁶⁰ The mission of DHS, which is spelled out in the Homeland Security Act,⁶¹ is to prevent terrorist attacks in the United States, reduce the vulnerability of the United States to terrorism, and minimize the damage from terrorist attacks.⁶² Although DHS is now the place where refugee protection decisions are made, the Department's mission statement lacks any mention of ensuring that the United States lives up to its obligations to refugees seeking asylum — obligations contained in U.S. law and international treaties.⁶³

Given this emphasis on security, and the absence of empha-

57. See Safe Third Country Agreement; see also *IMBALANCE OF POWERS*, *supra* note 42, at 37.

58. See Citizenship and Immigration Canada, *Canada-U.S. Safe Third Country Agreement* (Dec. 29, 2004), at <http://www.cic.gc.ca/english/policy/menu-safethird.html> (last visited Apr. 15, 2005).

59. See CANADIAN COUNCIL FOR REFUGEES, *10 REASONS WHY SAFE THIRD COUNTRY IS A BAD DEAL* (Feb. 2005), at <http://www.web.net/~ccr/10reasons.html> (last visited May 14, 2005); see also Vermont Refugee Assistance and the Vermont Immigration Project, *Frequently Asked Questions*, at <http://www.vermontrefugeeassistance.org/faqs.html#eleven> (last visited Mar. 30, 2005); *IMBALANCE OF POWERS*, *supra* note 42, at 37-38.

60. See USCIS, *INS Into DHS: Where Is It Now?*, at <http://uscis.gov/graphics/orther/gov/roadmap.htm> (last visited Apr. 15, 2005).

61. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified in various sections of 6 U.S.C. (2002)).

62. See 6 U.S.C. § 101(b)(1) (2002).

63. See U.S. Dep't of Homeland Security, *The DHS Strategic Plan — Securing Our Homeland*, at http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0413.xml (last visited Apr. 14, 2005). *But see* INA, § 244(c), 8 U.S.C. 1254(a) (2005); INA, § 101(a)(42)(A), 8 U.S.C. 1101 (2005), and U.S. Immigration Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified in various sections of 8 U.S.C. (1980)) (adopting the Refugee Convention's definition of a refugee and making nonrefoulement mandatory). See 1967 Protocol.

sis on refugee protection, asylum issues were to some extent destined to fall between the many cracks at the DHS. This risk was exacerbated by the bureaucratic structure of DHS, which separated the enforcement and service functions of the old INS into different bureaus within the new Department.

While the legal and operational expertise on asylum rests with U.S. Citizenship and Immigration Services (“USCIS”), the authority over the detention of asylum-seekers falls under the separate Bureau of Immigration and Customs Enforcement (“ICE”), which is part of a separate enforcement directorate (Border and Transportation Security).⁶⁴ Yet another enforcement bureau, the Bureau of Customs and Border Protection (“CBP”), has authority over immigration inspections and expedited removal, a summary deportation process in effect at U.S. airports and borders.⁶⁵ One additional complication is that the ICE trial attorneys, who act in effect as prosecutors in immigration court cases, do not report to the asylum legal experts in USCIS — even when taking legal positions on interpretations of asylum law, which they must necessarily do in almost every asylum case.⁶⁶

Immediately after DHS took over INS functions, ninety faith-based, human rights, refugee assistance, and non-profit legal organizations around the country wrote to the Secretary of DHS (then Tom Ridge) to raise concerns about having immigration functions relating to asylum-seekers divided into three separate DHS bureaus.⁶⁷ That letter, and a detailed briefing paper prepared by Human Rights First (formerly the Lawyers Commit-

64. See Bureau of Customs and Immigration Enforcement (“ICE”), *ICE Detention and Removal Operations*, at <http://www.ice.gov/graphics/dro/index.htm> (last visited May 14, 2005); see also REFUGEES, ASYLUM SEEKERS AND THE NEW DHS, *supra* note 7; ALEINIKOFF, *supra* note 7.

65. See U.S. Customs and Border Protection, About CBP: Mission, at <http://www.cbp.gov/xp/cgov/toolbox/about/mission/> (last visited Sept. 9, 2005); see also HUMAN RIGHTS FIRST, IN LIBERTY’S SHADOW 20 (2004), available at http://www.humanrightsfirst.org/asylum/libertys_shadow/Libertys_Shadow.pdf (last visited May 14, 2005) [hereinafter IN LIBERTY’S SHADOW].

66. See IN LIBERTY’S SHADOW, *supra* note 65, at 20; see also DAVID A. MARTIN, MIGRATION POLICY INSTITUTE, IMMIGRATION POLICY AND THE HOMELAND SECURITY ACT REORGANIZATION 11-12 (2003), available at http://www.migrationpolicy.org/insight/insight_4-2003.pdf.

67. See Letter From Human Rights First to the Honorable Thomas Ridge, Re: Detention of Asylum Seekers (Mar. 30, 2003), available at http://www.humanrightsfirst.org/us_laws/us_law_jet_032003.pdf (last visited Apr. 16, 2005) [hereinafter HRF Letter]; see also REFUGEES, ASYLUM SEEKERS AND THE NEW DHS, *supra* note 7.

tee for Human Rights), recommended that a number of safeguards be put in place within DHS to ensure that its policies and practices were consistent with refugee protection obligations under U.S. and international law.⁶⁸ In November 2003, Human Rights First began urging Secretary Ridge to create a high-level refugee protection position to ensure the proper resolution of refugee issues that cut across DHS bureaus.⁶⁹

More than two years after the transfer of asylum matters to DHS, those safeguards have still not been implemented. As a result, a lack of coordination still exists within DHS on various refugee and asylum issues. The problem has been especially evident in situations involving issues that cut across more than one DHS bureau.⁷⁰

In a report issued in February 2005, the bi-partisan U.S. Commission on International Religious Freedom ("USCIRF" or the "Commission") concluded that there are serious impediments to communication within DHS.⁷¹ The Commission had conducted a comprehensive study relating to asylum-seekers in expedited removal⁷² and detention, and outlined some of these difficulties in its report:

Four different components of DHS are now involved in Expe-

68. See HRF Letter, *supra* note 67.

69. See Letter From Elisa Massimino, Director, Washington Office, Human Rights First, to Thomas J. Ridge, Secretary, U.S. Dep't of Homeland Security (Nov. 5, 2003), available at http://www.humanrightsfirst.org/asylum/ridge_letter110503.pdf (last visited Apr. 16, 2005); see also *IN LIBERTY'S SHADOW*, *supra* note 65, at 45-48.

70. See *IN LIBERTY'S SHADOW*, *supra* note 65, at 20 (discussing the lack of communication between ICE and USCIS); see also UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM ("USCIRF"), 1 REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 51-52 (2005), available at http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/index.html (last visited Apr. 2, 2005) [hereinafter USCIRF STUDY, VOL. 1]. In August 2003, a group of leading Jewish organizations raised concerns about the U.S. practice of prosecuting asylum seekers. The groups did not receive any response to their substantive questions. See *IN LIBERTY'S SHADOW*, *supra* note 65, at 20.

71. See USCIRF STUDY, VOL. 1, *supra* note 70, at 5; see also HUMAN RIGHTS FIRST, NEW REPORT FROM U.S. RELIGIOUS FREEDOM COMMISSION EXPOSES BARRIERS FACING REFUGEES (2005), at http://www.humanrightsfirst.org/media/2005_alerts/asy_0208_relig.htm (last visited Apr. 16, 2005).

72. Expedited removal is a summary deportation process. If an immigration officer determines that an alien arriving in the United States is inadmissible under 8 U.S.C.A. § 1182(a)(6)(C) or § 1182(a)(7), the officer shall order the alien removed from the United States without further hearing or review unless the alien indicates either an intention to apply for asylum under section 8 U.S.C.A. 1158 or a fear of persecution, in which case, the officer shall refer the alien for an interview by an asylum officer. See Immigration and Nationality Act, § 235(b), 8 U.S.C. § 1225(b).

dited Removal. Under the current structure of DHS, any differences among these agencies must be resolved by the Secretary or Deputy Secretary of Homeland Security. This makes it exceedingly difficult to address inter-bureau issues regarding Expedited Removal, as those officials already oversee an amalgamation of 22 former federal agencies, including INS. As a practical matter, procedural difficulties regarding credible fear, parole, and conditions of detention cannot compete with the myriad of demands on the Secretary's time and attention and indeed should be resolved at lower levels While the refugee and asylum programs are housed within USCIS at DHS, neither USCIS nor any other office has been given the authority to resolve, or even to act as a forum on, inter-bureau issues relating to the impact of Expedited Removal on asylum-seekers and refugees. Rather, DHS has relied on ad hoc "working groups" to address particular issues after they arise.⁷³

To address this problem, the Commission urged that DHS create an office, headed by a high-level official, authorized to address cross-cutting asylum issues like expedited removal and detention.⁷⁴ The creation of this office was, in fact, the Commission's number one recommendation. In its report, the Commission made clear that this kind of mechanism was necessary to ensure that all of its other important recommendations were implemented and maintained.⁷⁵

III. *THE DETENTION OF ASYLUM SEEKERS: A DROP IN RELEASE RATES AND THE RISE IN NATIONALITY BASED POLICIES*

The plight of detained asylum-seekers has become more

73. See USCIRF STUDY, VOL. 1 *supra* note 70, at 63-64. For a discussion of the U.S. Commission on International Religious Freedom report, see Human Rights First, Asylum Protection News # 36, New Homeland Security Secretary Should Make Reforms for Refugees (Feb. 24, 2005), at http://www.humanrightsfirst.org/asylum/torchlight/newsletter/newslet_36.htm (last visited May 14, 2005).

74. See USCIRF STUDY, VOL. 1, *supra* note 70, at 8.

75. See *id.* at 15. The need to implement this recommendation — which had also been advanced by Human Rights First — has been recognized by the new DHS Secretary. On July 14, 2005, DHS Secretary Michael Chertoff announced that he would seek to create a senior asylum policy position. The mandate and functions of this proposed position had not been announced as of the publication of this Article. See Media Alert, Human Rights First, Homeland Security to Create Senior Refugee Position (July 13, 2005) available at http://www.humanrightsfirst.org/media/media_room.htm (last visited Oct. 10, 2005).

precarious since September 11th.⁷⁶ As noted above, the government's authority to detain immigrants was expanded by regulations shortly after the attacks.⁷⁷ This expanded authority was transferred to the new DHS when it took over INS functions in March 2003.⁷⁸

In the years since September 11th, it has become increasingly difficult for asylum-seekers to obtain release from immigration detention.⁷⁹ At the same time, the DOJ and DHS have initiated nationality-based detention policies targeting Haitian asylum-seekers and asylum-seekers from thirty-three nations and two territories — mostly Middle Eastern and other Islamic countries and territories.⁸⁰ Under these initiatives, federal authorities invoked national security concerns to justify new policies that called for the detention of asylum-seekers who presented no risk to the public.⁸¹ In fact, these policies have actually deprived those asylum-seekers of the opportunity to demonstrate that they do not present a risk and instead merit release on parole.

A. *The Drop in Release Rates*

In January 2004, Human Rights First released the results of

76. See discussion *supra* Part I.C.

77. See Richard Lacayo, *More Eyes On You; Do the Feds Need More Power to Fight Terrorism? The Attorney General Says Yes*, *TIME*, Oct. 1, 2001, at 66 (noting that in late September of 2001, U.S. Attorney General John Ashcroft extended the maximum detention time for immigrants from 24 to 48 hours); see also 66 Fed. Reg. 48, 334 (Sept. 20, 2001) (codified at 8 C.F.R. pt. 287.3(d)) (order modifying the Code of Federal Regulations dealing with immigration and naturalization, allowing law enforcement officials to detain immigrants for up to 48 hours while determining their naturalization status); see also Review of Custody Determinations, 66 Fed. Reg. 54,909, 54,910 (Oct. 31, 2001) (codified at 8 C.F.R. § 1003.19).

78. See Michael D. Patrick, *Immigration Law Detention Without Bond*, *N.Y.L.J.*, May 28, 2003, at 3.

79. See 2 USCIRF REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 332-33 (2005), available at http://www.uscirf.gov/countries/global/asylum_refugees/2005/february/index.html (last visited Apr. 2, 2005) [hereinafter USCIRF STUDY, VOL. 2] (reporting a significant drop in the rate at which local immigration officers have released asylum seekers on parole from these jail-like facilities in the years since September 11th); see also Nina Bernstein, *Out of Repression, Into Jail; Detention for Asylum-Seekers is Routine, but U.S. is Taking Another Look*, *N.Y. TIMES*, Jan. 15, 2004, at B1.

80. See Press Release, DHS, Operation Liberty Shield (Mar. 17, 2003), available at http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0115.xml (last visited Apr. 25, 2005) ("Asylum applicants from nations where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated will be detained for the duration of their processing period.").

81. See *infra* note 97 and accompanying text; see also *infra* note 103 and accompanying text.

a survey of *pro bono* attorneys and legal service providers around the country. The survey indicated that it had become even more difficult for asylum-seekers to obtain release from detention on parole since September 11th. Attorneys who worked with asylum-seekers in California, Louisiana, Michigan, Minnesota, New Jersey, New York, Washington DC, and other places reported that asylum-seekers who met the government's parole criteria were increasingly denied release from detention.⁸² In some areas, attorneys had been told that a "policy of blanket parole denial" was in effect, though no such policy had been made public.⁸³

The results of this survey were later confirmed when statistics on the detention of asylum-seekers were released.⁸⁴ A statistical analysis conducted by USCIRF revealed that there had in fact been a significant drop in the rate at which asylum-seekers were released on parole.⁸⁵ Between 2001 and 2003, the release rate fell by twenty-seven percent.⁸⁶ While in some areas of the country, asylum-seekers continued to be released from detention, in other places the chances of being released on parole plummeted. For example, between 2001 and 2003, the release rate fell by 69.5% in Los Angeles, by 34.9% in Michigan, by 85.6% in Maryland and by 99.2% in New Orleans. In New Jersey, the already low release rate of 16.2% fell by 77.7%, down to 3.6% in fiscal year 2003.⁸⁷

There are probably several reasons for these drops in release rates. While some asylum-seekers found themselves detained for the duration of their asylum proceedings under new blanket detention policies, others were detained longer because of shifts in local release practices.⁸⁸ Moreover, as the number of

82. See IN LIBERTY'S SHADOW, *supra* note 65, at 17.

83. *Id.*

84. See generally USCIRF STUDY, VOL. 2, *supra* note 79; Nina Bernstein & Marc Santora, *Asylum Seekers Treated Poorly, U.S. Panel Says*, N.Y. TIMES, Feb. 8, 2005, at A1 (noting that the bipartisan report by USCIRF found that asylum seekers were being treated like criminals while their claims were evaluated).

85. See USCIRF STUDY, VOL. 2, *supra* note 79, at 332.

86. See *id.* The national release rate for asylum seekers dropped from 86.1% in fiscal year 2001 down to 62.5% in fiscal year 2003. See *id.*

87. The release rate for asylum seekers in Los Angeles dropped from 98% in fiscal year 2001 down to 29.8% in fiscal year 2003; in Michigan the rate dropped from 76.9% to 50%; in Maryland the rate dropped from 38.9% to 5.6%; and in New Orleans, it dropped from 71.1% to 0.5%. See *id.* at 332-33.

88. See IN LIBERTY'S SHADOW, *supra* note 65, at 27-28.

new asylum-seekers has dipped, more space may have become available in some areas — giving local immigration officials the chance to fill a higher proportion of detention beds with asylum-seekers who might otherwise have been released on parole.⁸⁹

The official release criteria themselves have not changed. The relevant regulations and parole guidelines specifically prohibit the parole of anyone who would be barred from asylum or would present a risk to the community.⁹⁰ Yet, just as in other areas of immigration decision-making, immigration officers may be much more likely to say “no” than they were in the years before September 11th.⁹¹

But whatever the immediate explanation, it is the underlying flaws in the asylum detention system that have left it susceptible to these unexplained shifts in practices and to blanket policies that aim to prevent individualized decision-making. Chief among these flaws are the lack of independent review of the decision to detain an asylum-seeker and the failure to codify the release guidelines into enforceable regulations.⁹² The system, essentially, lacks the kinds of safeguards that help to prevent detention from becoming arbitrary under international human

89. See DHS, 2003 YEARBOOK OF IMMIGRATION STATISTICS 52 (Sept. 2004), available at <http://uscis.gov/graphics/shared/statistics/yearbook> (last visited Apr. 25, 2005) (noting that the number of new and reopened applications for asylum dropped by 27%, from 63,197 in fiscal year 2002 to 46,272 in fiscal year 2003).

90. See DHS Immigration Regulations, 8 C.F.R. § 212.5(a) (2004) (prohibiting parole of anyone who is a security risk); see also Memorandum from Michael A. Pearson, Immigration and Naturalization Service (“INS”) Executive Associate Commissioner for Field Operations, to Regional Directors, District Directors, and Asylum Office Directors, Expedited Removal: Additional Policy Guidelines, Dec. 30, 1997 (specifying that parole is only a viable option for asylum seekers who meet certain criteria and “are not subject to any possible bars to asylum involving violence or misconduct”). The 1997 INS Guidelines detail procedures to be followed if some concern arises that an individual may be a security risk, may be subject to a terrorist bar or may otherwise be a danger to the community. See *id.* These procedures include an investigation and inquiries to the FBI and other appropriate agencies. See *id.*; see also Memorandum from Michael A. Pearson, INS Executive Associate Commissioner, Office of Field Operations, to Regional Directors, Detention Guidelines Effective October 9, 1998, (Oct. 7, 1998), reprinted in 75 INTERPRETER RELEASES 1508 (1998) (providing that “it is INS policy to favor release of aliens found to have a credible fear of persecution, provided that they do not pose a risk of flight or danger to the community” (emphasis added)).

91. This phenomenon is referred to as the “culture of no.” See, e.g., *Business v Bush*, ECONOMIST, Oct. 18, 2003.

See ALEINIKOFF, *supra* note 7, at 9 (discussing the post 9-11 “zero tolerance” policy and the “culture of no”).

92. See IN LIBERTY’S SHADOW, *supra* note 65, at 8, 11.

rights law.⁹³

B. Operation Liberty Shield

On March 17, 2003, on the eve of war with Iraq, DHS announced that as part of Operation Liberty Shield, it would detain for the duration of their asylum proceedings, asylum-seekers from nations and territories “where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated.”⁹⁴ Under Operation Liberty Shield, arriving asylum-seekers — even those who met the relevant parole criteria and presented no risk to the public — were to be detained for the duration of their asylum proceedings if they were seeking refuge from one of the targeted States or territories.⁹⁵ The effect of Operation Liberty Shield was to deprive asylum-seekers from these mostly Arab or Muslim nations of the opportunity to have the necessity of their detention assessed on an individualized basis.⁹⁶

The justification of this measure was national security, though it called for the detention of even those asylum-seekers who were not a risk to the public. Secretary Ridge issued a written statement on March 18, 2003, stating that “these heightened security measures will help deter terrorism and increase protection of America and Americans.”⁹⁷

93. See Eleanor Acer, *Living up to America's Values: Reforming the U.S. Detention System for Asylum Seekers*, REFUGEE, May 2002, at 49 (discussing the U.S. system for detaining asylum seekers and noting various ways in which it is not consistent with international law and standards).

94. See Press Release, DHS, Operation Liberty Shield (Mar. 17, 2003), available at <http://www.dhs.gov/dhspublic/display?content=4234> (last visited May 14, 2005); see also Cam Simpson, *U.S. on Alert for "Lone Wolf" Attacks*, CHI. TRIB., Mar. 18, 2003, at C3 (discussing DHS changes in immigration policy following the U.S. invasion of Iraq).

95. See *id.*

96. See UN Agency Says U.S. Automatic Detention of Some Asylum Seekers 'Dangerous', AFX EUROPEAN FOCUS, Mar. 21, 2003 (noting that Operation Liberty Shield lacks individual assessment of security risk posed by specific individuals); see also Human Rights First, *Asylum Protection News #12, Department of Homeland Security Targets Asylum Seekers for Detention*, Mar. 19, 2003, at http://www.humanrightsfirst.org/asylum/torchlight/newsletter/newslet_12.htm (last visited June 7, 2005); Press Release, UNHCR, UNHCR Concerned About U.S. Detention of Asylum Seekers (Mar. 21, 2003).

97. Press Release, Operation Liberty Shield: Statement by Homeland Security Secretary Tom Ridge (Mar. 17, 2003), available at <http://www.dhs.gov/dhspublic/display?content=519> (last visited May 14, 2005) (noting that DHS refused to officially disclose the list of affected nationalities, stating that the complete list was “law enforcement sensitive”). The list appears to have included Afghanistan, Algeria, Bahrain, Bangladesh, Djibouti, Egypt, Eritrea, Indonesia, Iran, Iraq, Jordan, Kazakhstan, Kuwait,

Immediately after the policy was announced, numerous civil rights, faith-based, human rights, and refugee advocacy organizations expressed their concern about it.⁹⁸ Bishop Thomas G. Wenski, on behalf of the U.S. Conference of Catholic Bishops' Committee on Migration, expressed concern that the policy "harms individuals who are fleeing terror, is inappropriately discriminatory, violates accepted norms of international law, and undermines our tradition as a safe haven for the oppressed."⁹⁹ The U.N. High Commissioner for Refugees expressed concern that the policy's association of asylum-seekers and refugees with terrorism is "dangerous and erroneous," and stressed that asylum-seekers "have themselves escaped acts of persecution and violence, including terrorism, and have proven time and again that they are the victims and not the perpetrators of these attacks."¹⁰⁰

Operation Liberty Shield was officially terminated at the end of April 2003.¹⁰¹ According to DHS, forty-two people were

Lebanon, Libya, Malaysia, Morocco, Oman, Pakistan, Philippines, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Thailand, Tajikistan, Tunisia, Turkey, Turkmenistan, United Arab Emirates, Uzbekistan, and Yemen as well as Gaza and the West Bank. See Ricardo Alonso-Zaldivar, *Showdown With Iraq: Rights Groups Blast Policy to Detain Asylum Seekers*, L.A. TIMES, Mar. 19, 2003, at 12.

98. The policy was criticized by various groups, including Amnesty International USA, the Catholic Legal Immigration Network, the Episcopal Migration Ministries, the Ethiopian Community Development Council, the Hebrew Immigrant Aid Society, Human Rights Watch, the Lawyers Committee for Human Rights (now Human Rights First), the Lutheran Immigration and Refugee Service, the National Asian Pacific American Legal Consortium, the U.S. Committee for Refugees, the U.S. Conference of Catholic Bishops, and the Women's Commission for Refugee Women and Children. See, e.g., Michael Welch, *Quiet Constructions in the War on Terror: Subjecting Asylum Seekers to Unnecessary Detention*, 31 SOC. JUST. 113 (2004) (noting the opposition of Amnesty International, Human Rights Watch, the Lawyers' Committee for Human Rights, and the Women's Commission for Refugee Women and Children); Press Release, Hebrew Immigrant Aid Society, HIAS Alarmed by DHS' Detention of Asylum Seekers: Policy Leaves Most Vulnerable at Risk (Mar. 13, 2003), available at <http://www.hias.org/News/news03.html> (last visited May 14, 2005).

99. Statement of Bishop Thomas G. Wenski, Auxiliary Bishop of Miami, Chairman, U.S. Conference of Catholic Bishops, Committee on Migration, on Operation Liberty Shield (Mar. 20, 2003), available at <http://www.usccb.org/mrs/wenlib.shtml> (last visited May 14, 2005).

100. United Nations High Commissioner for Refugees, *UNHCR Appeals for Protection of Asylum-Seekers in the United States*, at <http://www.unhcr.ch/cgi-bin/texis/vtx/iraq?page=news&id=3e7b27384> (last visited Mar. 30, 2005).

101. See IN LIBERTY'S SHADOW, *supra* note 65, at 25; see also Asa Hutchinson, Remarks to the Association of American Chambers of Commerce in Latin America (May 7, 2003), available at <http://www.dhs.gov/dhspublic/display?content=628> (last visited May 14, 2005) (noting that Operation Liberty Shield was terminated on April 17, 2003);

detained as a result of the policy.¹⁰² Even after the policy was terminated, attorneys around the country continued to report that asylum-seekers from Arab and Muslim countries were being routinely detained for the duration of their asylum proceedings.¹⁰³

C. *The Haitian Detention Policy*

In early December 2001, a boat carrying about 170 Haitian men, women, and children arrived off the coast of Florida.¹⁰⁴ The INS instituted a blanket policy of denying parole to these and other Haitian asylum-seekers.¹⁰⁵ In October 2002, a second boat arrived, with more than 200 Haitian men, women and children swimming ashore near Key Biscayne, Florida.¹⁰⁶ Unlike the first group of Haitians, these asylum-seekers — simply because they had set foot on land before being detained — were entitled to seek their release in a bond re-determination hearing before an immigration judge.¹⁰⁷

The Bush Administration took several steps in an apparent attempt to deprive these and other Haitian asylum-seekers of any right to an individualized determination of the need for their detention: first, Haitian asylum-seekers who came to the United States by sea and whose detention was exclusively under the control of the INS, were subject to the INS and DHS policy of denying parole.¹⁰⁸

see also Human Rights First, *Asylum Protection News #15, Operation Liberty Shield Quietly Terminated*, May 15, 2003, at http://www.humanrightsfirst.org/asylum/torchlight/newsletter/newslet_15.htm (last visited June 7, 2005).

102. *See* IN LIBERTY'S SHADOW, *supra* note 65, at 25.

103. *See id.* at 24-25.

104. *See id.* at 25; *see also* WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, REFUGEE POLICY ADRIFT: THE UNITED STATES AND DOMINICAN REPUBLIC DENY HAITIANS PROTECTION 20 (Jan. 2003), available at <http://www.womenscommission.org/pdf/ht.pdf> (last visited Aug. 22, 2005) [hereinafter REFUGEE POLICY ADRIFT]; Bill Frelick, "Abundantly Clear": *Refoulement*, 19 GEO. IMMIGR. L.J. 245 (discussing U.S. history of refoulement of Haitian asylum seekers, including the U.S. Supreme Court's decision in *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) and the Bush Administration's return of Haitians in 2000).

105. *See* REFUGEE POLICY ADRIFT, *supra* note 104, at 22.

106. *See id.* at 30.

107. *See* IMBALANCE OF POWERS, *supra* note 42, at 30.

108. *See* IN LIBERTY'S SHADOW, *supra* note 65, at 22; *see also* Deborah Sharp, 6 *Charged With Attempting to Smuggle Haitians*, USA TODAY, Oct. 31, 2002, at 5A (reporting the Bush Administration's "quietly changed . . . detention policy on Haitians," set up to deter a "mass exodus" from Haiti). *See generally* REFUGEE POLICY ADRIFT, *supra* note 104,

The INS also began taking steps to suspend immigration judges' decisions to release asylum-seekers on bond, an implementation of the INS's recently expanded detention power.¹⁰⁹ In November 2002, The DOJ and INS issued a notice authorizing expedited removal of Haitian and other migrants who arrive by sea.¹¹⁰ The notice cited a "surge" in illegal migration by sea which "threaten[ed] national security" because it caused a diversion in U.S. Coast Guard resources.¹¹¹ The notice reflected DOJ's intent to preclude Haitians arriving in the future from having the right to seek release from detention from an immigration judge.¹¹²

In March 2003, the new DHS asked the Attorney General to review a Board of Immigration Appeals ("BIA" or "Board") decision to release an eighteen year-old Haitian asylum-seeker on bond, and to order stays of other Haitian release decisions.¹¹³ On April 17, 2003, in a sweeping decision, the Attorney General concluded that for national security reasons, the Haitian teenager was not entitled to an individualized assessment of the need for his detention. In the decision *In re D—J—*, the Attorney General directed immigration judges and the BIA to consider national security arguments in future detention custody deci-

at 30; Editorial, *Justice Denied, Again for Haitian Asylum Seekers*, MIAMI HERALD, Mar. 18, 2002; Jody Benjamin, *INS Admits New Get-Tough Policy on Haitians Aimed at Preventing Exodus*, S. FLA. SUN-SENTINEL, Mar. 20, 2002; Alfonso Chardy, *INS Clamps Down on Haitian Asylum-Seekers*, MIAMI HERALD, Mar. 20, 2002.

109. See *IN LIBERTY'S SHADOW*, *supra* note 65, at 22; see also Margaret H. Taylor, *Dangerous By Decree: Detention Without Bond In Immigration Proceedings*, 50 LOY. L. REV. 149, 164-67 (2004).

110. The authorization excluded Cubans. See Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924 (Nov. 13, 2002) [hereinafter Expedited Removal Notice]; see also INS Order 2243-02, Notice Designating Aliens Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68,924, 68,925 (Nov. 13, 2002) [hereinafter INS Order 2243-02].

111. Expedited Removal Notice, *supra* note 110, at 68,924; see *IN LIBERTY'S SHADOW*, *supra* note 65, at 22.

112. See Expedited Removal Notice, *supra* note 110, at 68,924-26; see also *IN LIBERTY'S SHADOW*, *supra* note 65, at 22; INS Order 2243-02, *supra* note 110.

113. See DHS Under Secretary for Border & Transportation Security Asa Hutchinson, Referral of Decision to the Attorney General, Mar. 20, 2003; see also National Immigration Law Center, *AG's Precedent Decision Denies Haitian's Release on Bond Based on Generalized National Security Concerns*, 17 IMMIGRANTS' RTS. UPDATE 3, ¶ 4 (June 3, 2003), available at <http://www.nilc.org/immlawpolicy/arrestdet/ad065.htm> (last visited Apr. 23, 2005); *IN LIBERTY'S SHADOW*, *supra* note 65, at 23.

sions.¹¹⁴

The Attorney General's explanation in *D—J*— contained no allegation that the asylum-seeker, David Joseph, presented any risk to the public. Instead, the Attorney General concluded that if Joseph and others were released, their release "would come to the attention of others in Haiti," which would "encourage future surges in illegal migration by sea," which in turn would "injure national security by diverting valuable Coast Guard and Department of Defense resources from counterterrorism and homeland security responsibilities."¹¹⁵ The Attorney General also asserted that the U.S. government lacked the resources to adequately screen the Haitians prior to release, presenting an additional security risk. This concern, the Attorney General explained, was supported by the State Department's assertion "that it has observed an increase in aliens from countries such as Pakistan using Haiti as a staging point for migration to the United States."¹¹⁶

The tenuous and convoluted nature of this "security" justification — which essentially argued that any diversion of U.S. resources would implicate homeland security — sparked widespread concern that the language of "security" was being used to mask what was actually a discriminatory detention policy.¹¹⁷ The Haitian policy, like the Operation Liberty Shield detention policy, targeted asylum-seekers for extended detention based on their nationality.¹¹⁸

These policies provide yet another example of the ways in which post September 11th policies have violated the human

114. *See In re D—J—*, 23 I. & N. Dec. 572, 579 (A.G. 2003); *see also* Taylor, *supra* note 109, at 165-69.

115. *Id.* at 579.

116. *Id.* at 580-81.

117. Statement of Most Reverend Thomas Wenski, Auxiliary Bishop of Miami and Chairman, United States Conference of Catholic Bishops' Committee on Migration, May 1, 2003 (expressing deep concern about Attorney General Ashcroft's decision, and concluding that "[s]uch systematic and discriminatory treatment of those who seek safe haven undermines our tradition as a defender of human rights and further erodes U.S. leadership and moral authority around the world"), *available at* <http://www.usccb.org/mrs/wenhaiasy.shtml>; *see also* Press Release, Hebrew Immigrant Aid Society, HIAS Issue May Day Warning, Rights of Immigrants Evaporating (May 1, 2003), *available at* www.HIAS.org; Susan Benesch, *Haitians Trapped by "War on Terrorism,"* AMNESTY MAGAZINE (2005), *available at* <http://www.amnestyusa.org/amnestynow/haiti.html>.

118. *See* Brief for Human Rights First (formerly Lawyers Committee for Human Rights) as Amicus Curiae Supporting Petitioners, *Moise v. Bulger*, 321 F.3d 1336 (11th Cir. 2003) (No. 02-13009-D), at 22.

rights of refugees. By depriving asylum-seekers of individualized assessments of the need for their detention and instead detaining them based on their nationality, the various measures directed at Haitian asylum seekers were inconsistent with basic human rights law prohibitions against non-discrimination and arbitrary detention.¹¹⁹

IV. *THE IMPACT ON INDIVIDUAL CASES*

The difficulties facing individual asylum-seekers who are trying to prove their eligibility for asylum have also multiplied in the time since September 11th. Some may be affected by the new bars to asylum under the PATRIOT Act or by the Safe Third Country Agreement with Canada. Many, however, have been affected by shifts in practice that have simply made it much more difficult to receive asylum. Attorneys at Human Rights First, who provide legal support in hundreds of asylum cases each year, have noticed that asylum officers and immigration judges seem to be requiring increasingly higher levels of proof to establish eligibility for asylum in individual cases.

In the time since September 11th, the rate at which U.S. asylum officers have granted asylum in individual cases has dropped. In 2000, about forty-four percent of asylum cases were granted by the U.S. Asylum Office. By 2003, that number had dropped by thirty-four percent, down to about twenty-nine percent.¹²⁰

Also troubling is the dramatic drop in the approval of asylum appeals at the BIA.¹²¹ On February 6, 2002, Attorney General Ashcroft publicly announced plans to make dramatic changes to speed up the way that the BIA, the administrative board that reviews the decisions of immigration judges, considers and decides cases pending before it.¹²² The changes were described as necessary to tackle the significant backlog of cases

119. *See generally id.*; Acer, *supra* note 93.

120. The number of cases granted is based on the number of cases adjudicated, not on the total number of cases received. *See* USCIS, FISCAL YEAR 2003 YEARBOOK OF IMMIGRATION STATISTICS, (last modified Sept. 24, 2004), *available at* <http://uscis.gov/graphics/shared/aboutus/statistics/RA2003yrbk/RAExcel/Table16.xls>.

121. *See* IN LIBERTY'S SHADOW, *supra* note 65, at 27.

122. *See id.* at 25. The Board of Immigration Appeals ("BIA") is part of the Executive Office for Immigration Review, an agency that is part of the U.S. Department of Justice.

at the BIA and to promote national security.¹²³ Ashcroft cited the September 11th attacks in justifying these changes, stating that:

[O]ur [N]ation's security demands that our immigration laws be enforced efficiently, fairly and without delay. In the wake of the September 11th occurrences of last year, such concerns rise to a new level of importance. Today's announced reorganization of the Board of Immigration Appeals will meet these objectives while protecting due process.¹²⁴

The Attorney General's changes included provisions that: (1) required individual BIA members to review and decide most cases with one-sentence orders; (2) limited the BIA's scope of review; and (3) decreased the time for asylum-seekers to file appellate briefs.¹²⁵ The DOJ also announced that it would reduce the number of BIA adjudicators from twenty-three to eleven — sending a clear message that jobs were on the line.¹²⁶ The Board itself, shortly after this announcement, took its own steps to speed up decisions in asylum cases.¹²⁷

The changes made at the Board in 2002 have undermined the ability of asylum-seekers to obtain a full and fair hearing on their claims, leading essentially to the BIA's "rubber-stamping" of immigration judge denials in many asylum cases.¹²⁸ Prior to

123. Attorney General John Ashcroft, Transcript of News Conference — Administrative Change to Board of Immigration Appeals (Feb. 6, 2002), available at <http://www.usdoj.gov/archive/ag/speeches/2002/020602transcriptadministrativechangetobia.htm> (last visited Apr. 13, 2005).

124. *Id.*

125. See 8 C.F.R. § 1003.1(a)(1), (d)(3), (e)(4)(ii) (2005); see also Press Release, U.S. Dep't of Justice, Attorney General Issues Final Rule Reforming Board of Immigration Appeals Procedures (Aug. 23, 2002), available at http://www.usdoj.gov/opa/pr/2002/August/02_eoir_489.htm (last visited May 14, 2005).

126. See 8 C.F.R. § 1003.1(a)(1). Only 19 of the Board's 23 positions were filled at the time that the Attorney General announced the proposed changes.

127. See Memorandum from Lori L. Scialabba, Acting Chairman, U.S. Dep't of Justice, Bd. of Immigration Appeals, Use of Summary Affirmance Orders in Asylum and Cancellation Cases (Mar. 15, 2002), available at <http://www.usdoj.gov/eoir/vll/genifo/stream.htm> (authorizing the use of summary affirmances in asylum and withholding cases under prior streamlining authority). See also Lisa Getter & Jonathan Peterson, *Speedier Rate of Deportation Rulings Assailed; Ashcroft's Goal to Clear Backlog of Immigration Appeals Has Board Members Deciding Cases in Minutes; Increasingly, Foreigners Are Losing*, L.A. TIMES, Jan. 5, 2003, at 1.

128. Getter & Peterson, *supra* note 127. See also ABA Comm. on Immigration Policy, Practice & Pro Bono, *Seeking Meaningful Review: Findings and Recommendations in Response to Dorsey & Whitney Study of Board of Immigration Appeals Procedural Reforms* (Oct. 2003) available at <http://www.abanet.org/immigration/bia.pdf>.

these changes, the BIA typically decided cases by three-judge panels and granted twenty-five percent of these appeals.¹²⁹ Since then, the numbers have changed markedly. A law firm working with Human Rights First analyzed about 1400 asylum, withholding of removal, and Convention Against Torture cases decided by the BIA in September 2002.¹³⁰ In approximately eighty percent of these cases, a single BIA adjudicator affirmed the decision of the immigration judge in a one-sentence opinion.¹³¹ Moreover, the BIA granted asylum, withholding of removal, or Convention Against Torture relief in less than five percent of these cases.¹³²

The *Los Angeles Times* conducted a review of BIA decisions made between February and October 2002, and concluded that board members “are reviewing cases individually and ruling within minutes, often issuing just two-line decisions.”¹³³ The newspaper’s review of BIA statistics led it to observe that “as the number of cases decided by the board has soared, so has the rate at which board members have ruled against foreigners facing deportation.”¹³⁴

The steep drop in the approval of asylum appeals was also documented by the U.S. Commission on International Religious Freedom. In its February 2005 report, the Commission noted that although the BIA sustained twenty-four percent of asylum appeals in expedited removal cases in fiscal year 2001, since the 2002 changes, the BIA has granted only two to four percent of these appeals.¹³⁵ The Commission noted that “[s]tatistically, it is highly unlikely that any asylum-seeker denied by an immigration judge will find protection by appealing to the BIA.”¹³⁶

129. See *IN LIBERTY’S SHADOW*, *supra* note 65, at 26.

130. See *id.* at 26. This information was obtained from the Executive Office for Immigration Review in the summer of 2003 through a Freedom of Information act request filed by the law firm of Jones Day on December 19, 2002.

131. See *id.*

132. See *id.*

133. Getter & Peterson, *supra* note 127, at 1 (quoting former BIA Member Lory Rosenberg: “[E]mphasis is placed on speed, not legal precision . . . [staff attorneys are] rewarded for numbers.”).

134. *Id.*

135. See *ASYLUM SEEKERS IN EXPEDITED REMOVAL*, *supra* note 70, at 44.

136. See *id.*

V. THE EFFORT TO CHANGE U.S. ASYLUM LAW

While asylum-seekers have been affected by many changes in policies and practices in the post-September 11th United States, there was no full-fledged assault on asylum law in the three years immediately following the attacks. This should hardly be a surprise. None of the perpetrators of the September 11th attacks were asylum-seekers. The asylum system had, moreover, been substantially overhauled in the mid-1990s, in the wake of the first attack on the World Trade Center.¹³⁷ The bottom line is that U.S. law already bars from asylum anyone who engages in terrorist activity and anyone who is or may reasonably be considered a danger to the security of the United States.¹³⁸

Yet some legislators seem to view asylum as an easy target. Asylum seekers do not vote.¹³⁹ Their path to citizenship has for years been delayed by a statutory limit on the number of asylees who can receive “green cards” each year.¹⁴⁰ As a result, refugees who have been granted asylum have had a ten and even fifteen year wait before they can become legal permanent residents of the United States.¹⁴¹ In some ways, then, asylum seekers have

137. See HUMAN RIGHTS FIRST, IS THIS AMERICA? THE DENIAL OF DUE PROCESS TO ASYLUM SEEKERS IN THE UNITED STATES (2000), available at http://www.humanrightsfirst.org/refugees/reports/due_process/due_pro_I.htm (last visited May 14, 2005); see also U.S. IMMIGRATION AND NATURALIZATION SERVICE, ASYLUM REFORM: FIVE YEARS LATER 7-8 (2000), available at http://uscis.gov/graphics/services/asylum/asylum_brochure.pdf (last visited Oct. 10, 2005).

138. See 8 U.S.C. § 1182(a)(3)(A)-(B) (2000 & Supp. II 2002). U.S. law also requires that multiple security checks be conducted on each and every asylum applicant. See Human Rights First, Security Procedures in the U.S. Asylum System (Aug. 2004), at <http://www.humanrightsfirst.org/asylum/pdf/asylumsecurity.pdf>.

139. See LUTHERAN IMMIGRATION AND REFUGEE SERVICE, POCKET KNOWLEDGE 6 (2003), available at <http://www.lirs.org/InfoRes/PDFs/PocketKnowledge.pdf> (last visited May 13, 2005) (listing rights of asylees); see also Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional, and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1461 (1993) (noting that no State permits noncitizens to vote).

140. See 8 U.S.C. § 1159(b) (2005) (setting the annual asylee limit at 10,000). This “cap” was finally eliminated in May 2005. See Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, H.R. 1268, 109th Cong. (1st Sess. 2005).

141. See USCIS, *Adjustment of Status for Asylees* (Mar. 18, 2005), at <http://uscis.gov/graphics/fieldoffices/nebraska/asyleeadj.htm> (last visited May 15, 2005) (showing that applications to adjust status received by January 10, 2005 are estimated to be processed between October 1, 2015 and September 30, 2016); see also Letter from Human Rights First et al., to U.S. Congress (Feb. 9, 2005), available at <http://www.humanrightsfirst.org/asylum/pdf/realid/sensbrenneramdsignon020905.pdf> (last visited Apr. 29, 2005).

perhaps been perceived as a relatively voiceless constituency who are lacking in significant political clout — and an easy target for officials who want to demonstrate that they can be “tough” on immigration and security.

Beginning in late 2004, some members of the U.S. House of Representatives attempted to add a number of changes to U.S. asylum law to the legislation implementing the recommendations of the 9/11 Commission.¹⁴² Although the asylum changes had not been recommended by the 9/11 Commission, the proponents of these provisions began to use the language of security to justify these changes and attempted to use the September 11th legislation as a vehicle for enacting their proposals.¹⁴³ When this attempt failed, they renewed their efforts in early 2005 — combining these provisions with a proposal to restrict access to driver’s licenses in a bill known as the “REAL ID Act.”¹⁴⁴

Some of these changes to asylum law had been introduced in the U.S. Congress before, but had generated little support.¹⁴⁵ Others were highly technical changes to burdens of proof, to standards concerning the reasons for persecution, and to assessments of credibility — changes that sought to overturn the decisions of a number of federal appeals courts and the precedent of the BIA.¹⁴⁶ One of the most excessive provisions sought to bar U.S. federal courts from issuing stays of removal to prevent the deportation of asylum-seekers while their cases are pending before federal courts.¹⁴⁷ When examined closely, these changes look more like a sort of “wish list” drafted by government immigration lawyers whose litigation positions had been rejected by

142. See Press Release, Human Rights First, Intelligence Bill Agreement Strikes Provisions That Harm Refugees (Dec. 7, 2004), available at http://www.humanrightsfirst.org/media/2004_alerts/asy_1207_hr10.htm (last visited May 14, 2005). The 9/11 Commission was created by Congress to investigate the September 11th attacks and provide recommendations to guard against future attacks. See Nat’l Comm’n on Terrorist Attacks Upon the United States, *Homepage*, at <http://www.9-11commission.gov/>.

143. See *infra* note 157.

144. See Human Rights First, *Senate to Take Up REAL ID Act, Bill Puts Real Lives in Danger*, at http://www.humanrightsfirst.org/asylum/asylum_10_sensenbr.asp (last visited Apr. 17, 2005).

145. See *id.*

146. See Real ID Act of 2005, H.R. 418, 109th Cong. § 101 (2005); see also 9/11 Recommendations Implementation Act, H.R. 10, 108th Cong. § 3007 (2004).

147. See H.R. 418 § 105.

judges, than a package of changes aimed at protecting U.S. security.

A. *The 9/11 Commission Intelligence Bill*

The proponents of these anti-asylum measures saw their chance in the Fall of 2004. The approaching presidential election contributed to the imperative to pass legislation to implement the 9/11 Commission's recommendations. On October 8, 2004, the House of Representatives passed the "9/11 Recommendations Implementation Act" ("H.R. 10").¹⁴⁸ This House bill, despite its name, contained a number of provisions that were not recommended by the bipartisan 9/11 Commission.¹⁴⁹

Several of these provisions would have put the lives and safety of victims of torture and other persecution at risk. H.R. 10 would have made it much more difficult for genuine refugees to prove their asylum cases, and would have deprived victims of torture and other persecution of meaningful judicial review.¹⁵⁰ For example, H.R. 10 would have allowed genuine refugees to be denied asylum if the U.S. Department of State failed to document the problems they faced, if they did not submit corroborating evidence that an adjudicator thought they should be able to submit, and if they could not prove the "central" reason they were targeted by persecutors.¹⁵¹ The bill also sought to eliminate stays of removal when a case is appealed to a federal court — so that people in danger of torture or other persecution could have been returned to the country that would harm them while their cases were pending before U.S. federal courts.¹⁵² Yet another provision of H.R. 10 would have expanded the use of expedited removal, depriving some non-citizens of immigration court hearings prior to deportation when they had been in the United States for up to five years.¹⁵³

The proponents of the asylum provisions of H.R. 10 repeatedly asserted that these provisions were needed to protect the

148. 9/11 Recommendations Implementation Act, H.R. 10.

149. See Letter from 9/11 Comm'n Chair Thomas H. Kean & Vice Chair Lee H. Hamilton to U.S. Rep. Peter Hoekstra (Oct. 20, 2004), at <http://www.humanrightsfirst.org/asylum/pdf/911-commission-ltr-102004.pdf> (last visited May 14, 2005).

150. See, e.g., 9/11 Recommendations Implementation Act, H.R. 10, §§ 3007(b), 3009.

151. *Id.* § 3007(a).

152. *Id.* § 3009.

153. *Id.* § 3006.

United States from terrorists.¹⁵⁴ Citing to a case relating to the 1993 World Trade Center bombing, the bill's proponents neglected to mention that major reforms had been made to the asylum system after that attack.¹⁵⁵ Seizing on public fears of terrorism, House Judiciary Committee Chairman James Sensenbrenner (R-WI) claimed publicly that "terrorists are getting asylum today."¹⁵⁶ The 9/11 Commission itself though, in an October 2004 letter, stressed that the immigration provisions "are not Commission recommendations" and stated that "we believe strongly that this bill is not the right occasion for tackling controversial immigration and law enforcement recommendations."¹⁵⁷

After Congressional negotiators finally reached an agreement, a compromise bill, known as the "Intelligence Reform and Terrorism Prevention Act of 2004," was signed into law by President Bush on December 17, 2004.¹⁵⁸ Ultimately, many of the provisions that would have harmed refugees were not included in the final legislation. The new law did, however, contain other immigration-related provisions, including a dramatic increase in the number of beds available for immigration detention.¹⁵⁹

Despite the fact that the anti-refugee provisions were struck from the final bill, the proponents of these asylum provisions, led by Chairman Sensenbrenner, announced that they would try to attach these same provisions to the first "must pass" legislation introduced in the next Congress in January 2005.¹⁶⁰ Chairman

154. See Press Release, U.S. Rep. John Hostettler, Border Security and Enforcement Measures Included in 9/11 Commission Legislation (Sept. 28, 2004), available at <http://www.house.gov/hostettler/Hostettler-news.htm> (last visited Apr. 15, 2005). See also Press Release, U.S. House of Representatives, Comm. on the Judiciary, Sensenbrenner Statement During House Floor Debate on 9/11 Legislation Conference Report (Dec. 7, 2004), available at <http://www.judiciary.house.gov/newscenter.aspx?a=425>.

155. See *supra* note 137-38 and accompanying text; see also Doris Meissner, Letter to the Editor, *Not Broke, Don't Fix*, WASH. TIMES, Feb. 20, 2005, at B05 (Ms. Meissner is a former Commissioner of the INS and a senior fellow at the Migration Policy Institute).

156. 150 CONG. REC. H10998 (daily ed. Dec. 7, 2004) (statement of Rep. Sensenbrenner). *But see* Meissner, *supra* note 155.

157. Letter from 9/11 Comm'n Chair Thomas H. Kean & Vice Chair Lee H. Hamilton to U.S. Rep. Peter Hoekstra (Oct. 20, 2004), at <http://www.humanrightsfirst.org/asylum/pdf/911-commission-ltr-102004.pdf> (last visited Oct. 10, 2005).

158. See Intelligence Reform and Terrorism Prevention Act of 2004, S. 2845, 108th Cong. (2004).

159. See *id.* § 5204.

160. Press Release, U.S. House of Representatives, Comm. on the Judiciary, Sensenbrenner to Introduce Border Security and Immigration Legislation Dropped From

Sensenbrenner promised that the new legislation would include provisions to “tighten” the “asylum system abused by terrorists.”¹⁶¹

B. *The REAL ID Act*

As promised, in January 2005, Chairman Sensenbrenner and his colleagues quickly launched their effort to advance many of the same provisions relating to asylum and to drivers' licenses that had been excluded from the final intelligence bill.¹⁶² Chairman Sensenbrenner stressed that he had received assurances from House leaders that his bill was a “top priority.”¹⁶³ On February 10, 2005, the REAL ID Act (H.R. 418) was passed with a 261-161 vote margin by the House of Representatives.¹⁶⁴

This House bill contained a series of provisions that would have put refugees at significant risk of being deported back into the hands of their persecutors. Specifically, the bill would have: (1) allowed a refugee who testifies credibly to be denied asylum if she is unable to track down documents to confirm or “corroborate” her credible testimony — for instance, where this effort might endanger her family; (2) required a refugee to prove her persecutor’s “central” reasons for harming her — essentially penalizing a refugee who cannot prove with unrealistic precision what is going on in her persecutor’s mind; and (3) given an immigration officer or immigration judge broad leeway to deny a refugee asylum based on her “demeanor” or based on any inconsistencies in her prior statements, even minor mistakes in remembering dates that do not relate to her persecution or

9/11 Commission Conference Report (Dec. 8, 2004), available at <http://www.judiciary.house.gov/newcenter.aspx?a=427>; see also Matthew L. Wald & David D. Kirkpatrick, U.S. May Require Closer Scrutiny To Get A License, N.Y. TIMES, May 3, 2005, at A1; Michelle Mittelstadt, House Votes to Restrict Licensees Critics Say Terror Being Used as Excuse to Crack Down on Immigrants, DALLAS MORNING NEWS, Feb. 11, 2005, at 20A. The REAL ID Act as ultimately passed contained improved versions of these provisions. See *infra* Part VI(B); see also *infra* note 170.

161. Congressman F. James Sensenbrenner, Jr., Statement (Jan. 27, 2005), available at www.house.gov/sensenbrenner/wc20050127.html (last visited Apr. 13, 2005) [hereinafter Sensenbrenner Statement].

162. See Mary Curtius, *The Nation*; GOP Congressman Renews Push for Immigration Curbs, L.A. TIMES, Jan. 27, 2005, at A18 (discussing Senator Sensenbrenner’s new legislation and how his priorities differ from those of the President).

163. Sensenbrenner Statement, *supra* note 161.

164. See Charlie Savage, *Conservative Camps Split on Tightening Asylum*, BOSTON GLOBE, Feb. 21, 2005, at A1.

fears.¹⁶⁵

At the last minute, another harmful provision was added to the House bill.¹⁶⁶ This additional provision, like a similar provision that had been included in the intelligence bill (H.R. 10), would have prohibited a U.S. federal court from issuing a stay of removal to prevent an asylum-seeker from being deported back into the hands of her persecutors while her case is pending before the U.S. court. The bill also expanded the bars to asylum to such an extent that it would allow people who bear no personal responsibility for terrorist acts — even the wives and children of victims of extortion by terrorist or militant groups — to be deported and barred from asylum based on overly broad definitions of “terrorism” and of “supporting” terrorism.¹⁶⁷

Once again, the proponents of these provisions used the language of terrorism to defend them. For example, Chairman Sensenbrenner described the REAL ID Act as “critical to our anti-terrorism efforts” and claimed that it would “tighten our asylum system, which has been abused by terrorists.”¹⁶⁸

The Real ID Act was passed by the U.S. Congress on May 10, 2005, as part of an emergency spending bill relating to Iraq and aid to Tsunami survivors. It was signed into law by President Bush on May 11, 2005.¹⁶⁹ The opponents of the Real ID Act were successful in maintaining some meaningful judicial review in asylum cases. The House provision that would have barred federal court stays of removal for asylum seekers whose cases were pending before federal courts was eliminated from the final bill.¹⁷⁰ At the same time though, the Real ID Act may —

165. See Real ID Act, H.R. 418, 109th Cong. § 101(a)(3)(B)(i)-(iii) (2005); see also Human Rights First, Senate to Take up REAL ID Act, Bill Puts Real Lives in Danger, at http://www.humanrightsfirst.org/asylum/asylum_10_sensenbr.asp (last visited Mar. 30, 2005).

166. See H.R. 418 § 105.

167. H.R. 418 §§ 103, 104.

168. Sensenbrenner Statement, *supra* note 161. But see Meissner, *supra* note 155.

169. See Real ID Act of 2005, Pub. L. 109-13 (2005). See also Press Release, Human Rights First, REAL ID Endangers People Fleeing Persecution (June 6, 2005), available at http://www.humanrightsfirst.org/asylum/asylum_10_sensenbr.asp. Although the White House had initially expressed concerns about the asylum provisions of the REAL ID Act, the White House ultimately supported the effort to attach the bill to the emergency spending measure. See Press Release, Human Rights First, House and Senate Negotiators Include Anti-Refugee Provisions in ‘Must-Pass’ Spending Bill (May 4, 2005).

170. Compare Real ID Act of 2005, H.R. 418, 109th Cong. (2005) (as introduced in the U.S. House of Representatives, Jan. 26, 2005), with Real ID Act of 2005, Pub. L. 109-13 (2005) (as passed by both the House and Senate, and signed by the President May

depending on how it is applied (or misapplied) by adjudicators — make it much harder for refugees to prove that they qualify for asylum in the United States. Under the Real ID Act, refugees can be denied asylum based on their “demeanor”.¹⁷¹ This provision fails to take into account how people from different countries interact with authority figures — in particular, how they talk about traumatic personal experiences.¹⁷² The REAL ID Act could also allow a refugee to be denied asylum based on an inconsistency that does not go “to the heart of the applicant’s claim.”¹⁷³ While the final version of the bill included new language directing adjudicators to consider the “totality of the circumstances” and “all relevant factors when basing credibility determinations on inconsistencies, demeanor, or other factors, the natural tendency of the asylum provisions of the REAL ID Act will likely be to provide statutory cover for shoddy decision-making.”¹⁷⁴

A refugee could also be denied asylum under this new law if

11, 2005). The final bill also contained a revised version of the proposed “corroboration” requirement — rejecting the approach of the House bill and instead following the case law of the Board of Immigration Appeals and several federal circuit courts that assess the reasonableness of the requirement. *See* *Matter of S-M-J*, 21 I. & N. Dec. 722 (B.I.A. 1997); *Diallo v. INS*, 232 F.3d 279 (2d Cir. 2000); *Qui v. Ashcroft*, 329 F.3d 140 (2d Cir. 2003); *Abdulai v. Ashcroft*, 239 F.3d 542 (3d Cir. 2001); *Mulanga v. Ashcroft*, 349 F.3d 123 (3d Cir. 2003). The final corroboration provision will impact cases arising within the Ninth Circuit, which had taken a different approach. *See* *Ladha v. INS*, 215 F.3d 889 (9th Cir. 2000); *see also* *Kaur v. Ashcroft*, 379 F.3d 876, 890 (9th Cir. 2004).

171. *See* Real ID Act of 2005, Pub. L. 109-13, § 101(a)(3)(B)(iii); *see also* Anwen Hughes & American Immigration Law Found., *REAL Faces, REAL People: Navigating the REAL ID Act*, *Immig. L. Today*, July-Aug. 2005, at 17-18 [hereinafter *Navigating the REAL ID Act*] (noting that the adjudicator is required to consider the “totality of the circumstances, and all relevant factors”).

172. *See* Ass’n of the City Bar of New York, Statement in Opposition to the REAL ID Act (Feb. 9, 2005) available at http://www.abcny.org/pdf/report/REAL_ID.pdf; *see generally* Ilene Durst, *Lost in Translation: Why Due Process Demands Deference to the Refugee’s Narrative*, 53 *RUTGERS L. REV.* 127, 128 (2000) (arguing that “[m]any negative determinations of credibility can be explained by the inability of the asylum applicant, or his attorney, to translate the persecution suffered into a narrative graspable by the adjudicator, and/or the adjudicator’s inability to transcend the barriers created by the inherent otherness of trauma, culture, and language.”).

173. *See* *Navigating the REAL ID Act*, *supra* note 171, at 16 (arguing that statutory language indicates that alleged inconsistency must still be relevant to claim, even though it does not go to the heart of it). The Real ID Act allows immigration judges making credibility assessments of asylum applicants to take into account inaccuracies in their statements “without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant’s claim, or any other relevant factor.” *See* Real ID Act of 2005, Pub. L. 109-13, § 101(a)(3)(B)(iii) (emphasis added).

174. *See* Real ID Act of 2005, Pub. L. 109-13, § 101(a)(3)(B)(iii) (codified as

she can't show that race, religion, nationality, social group membership or political opinion is "at least one central reason" for her past or feared persecution.¹⁷⁵ The Real ID Act will also allow people who bear no personal responsibility for terrorist acts — even the wives and children of victims of extortion by militant groups — to be deported and barred from asylum based on overly broad definitions of "terrorism" and of what constitutes "supporting" terrorism.¹⁷⁶

This new law constitutes a significant blow to U.S. asylum law and to the rights of refugees. Its impact will be compounded by the serious problems that already plague the U.S. asylum adjudication system — the variations in immigration judge grant rates,¹⁷⁷ the dramatic drop in asylum grant rates¹⁷⁸ and appellate grant rates,¹⁷⁹ and the deeply troubling lack of legal representation.¹⁸⁰ With the REAL ID Act in place, the United States may very well find itself returning refugees to their countries of persecution, despite its obligations to the contrary under the 1951 Refugee Convention and its Protocol.¹⁸¹

amended at Immigration and Nationality Act ("INA") § 208(b)(1)(B)(iii), 8 U.S.C. 1158 (2005))

175. See Real ID Act of 2005, Pub. L. 109-13, § 101(a)(3)(B)(i). This language explicitly allows for the possibility that several reasons can give rise to persecution; moreover, nothing in the relevant conference report repudiates the BIA's recognition of persecution based on so-called "mixed motives" in *Matter of S-P*, 21 I. & N. Dec. 486 (B.I.A. 1996). In addition, the reference to the *reason* rather than the *motive* of the persecution suggests an objective focus on the causes of the persecution rather than on the subjective motivation of the persecutor. See Lory Diana Rosenberg, *Asylum and Protection From Removal After "Real ID" — Newly Articulated Standards and a Reservoir of Law*, 10-13 BENDER'S IMMIGR. BULL. 1 (July 1, 2005); see also *Navigating the REAL ID Act*, *supra* note 171, at 16.

176. See Real ID Act of 2005, Pub. L. 109-13, § 103(ix); see also *Navigating the REAL ID Act*, *supra* note 171, at 19.

177. See USCIRF STUDY, VOL. 2, *supra* note 79, at 424-41.

178. See U.S. Dep't of Justice, Executive Office of Immigration Review, 2003 Statistical Yearbook 53, available at <http://www.usdoj.gov/eoir/statspub/fy03syb.pdf>.

179. See USCIRF STUDY, VOL. 2, *supra* note 79, at 239.

180. See USCIRF STUDY, VOL. 1, *supra* note 70 at 4; see also USCIRF STUDY, VOL. 2, *supra* note 79, at 260; Andrew I. Schoenholtz & Jonathon Jacobs, *The State of Asylum Representation: Ideas for Change*, 16 GEO. IMMIGR. L.J. 739 (2002). See generally Donald Kerwin, *Revisiting the Need for Appointed Counsel*, MIGRATION POL'Y INST. INSIGHT, Apr. 2004, available at http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf.

181. See Refugee Convention, *supra* note 11, art. 1; see also 1967 Protocol, *supra* note 11.

CONCLUSION

The United States is essentially at a critical crossroads. The U.S. government, U.S. policymakers and U.S. citizens have some decisions to make — decisions that will determine whether or not this country will continue to be a leader in the protection of refugees — or not. Will U.S. leaders step forward and do all that is necessary to ensure that this country lives up to its long tradition of protecting those who flee from persecution? Will the Homeland Security Secretary create the kinds of structural safeguards that are necessary to make sure that asylum-seekers are treated properly by the various arms of the Department? Will the US Congress finally stand up to those who co-opt the language of fear and instead commit to correcting the misguided laws that deprive genuine refugees of a fair and meaningful chance to receive this country's protection?

The monumental task that Arthur Helton identified — ensuring that the rights of refugees are not violated in the post-September 11th United States — has not been met. In fact, the rights of many refugees have been ignored, and sometimes trampled upon, in the new security climate. Many have been jailed under procedures that are arbitrary under international law; others have been denied asylum even though they are in fact refugees entitled to protection under international law. Under the REAL ID Act, still others will be at risk of deportation into the hands of their persecutors if they cannot satisfy the law's unrealistic and unfair requirements. By returning refugees to their countries of persecution, the United States will be in violation of its core legal commitments under the Refugee Convention and Protocol.

There is still hope though. A diverse coalition of groups are working together to preserve asylum. These groups, which include faith-based and religious groups as well as human rights, refugee assistance, and civil rights organizations, span the political spectrum.¹⁸² At the same time, some Congressional leaders from both parties have opposed extreme legislative proposals that undermine this country's commitment to refugees.

182. See Savage, *supra* note 164; see also HEBREW IMMIGRANT AID SOC., FAITHFUL BUT FORESAKEN: REAL ID ACT HARMS VICTIMS OF RELIGIOUS PERSECUTION (Apr. 11, 2005), available at http://www.hias.org/News/Docs/FaithfulButForsaken_4-12-05.pdf; Suzanne Gamboa, *Faith-Based Groups Oppose Immigration Bill*, AP, Jan. 30, 2005.

But stronger leadership is needed. The Bush Administration and the U.S. Congress should categorically reject attempts to brand asylum-seekers as terrorists and to undermine the institution of asylum. Most critically, refugees themselves must be given a greater voice in this country. Ironically, the REAL ID Act, which contained so many anti-refugee provisions, also contained a provision that lifts the cap limiting the number of asylees who can obtain their green cards each year. This change will mean that asylees will no longer have to wait ten or fifteen years to become permanent U.S. residents, a delay that has prolonged their path to citizenship and, as a result, reduced their voices in public debates.

Affording refugees themselves a greater voice in these debates will also help to promote a better understanding of who refugees are — and who they are not. As Helton once observed, in reflecting on refugees:

To States, they can be security risks. To ordinary people, they can be objects of pity and charity. But refugees matter most fundamentally because at some level we all realize that but for the accidents of birth and circumstance, we could be refugees ourselves.¹⁸³

This fundamental human understanding has somehow been lost in the broader discussions on asylum policy in the United States. Instead, both the humanitarian impulse to help and the legal obligation to do so have been undercut — not so much because of the imperatives of security, but primarily because of the misuse and opportunistic abuse of the language of “security.”

The next few years will, however, be decisive. The U.S. Congress and the Bush Administration will need to make some critical choices. Only if they choose to uphold this country’s commitment to those who flee from persecution and to abide by its legal obligations to refugees, will the United States reverse its current course and achieve the task that Arthur Helton identified: ensuring that the rights of refugees are not violated in this new age of security.

183. Helton, *supra* note 1.